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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1967

No. 1226

J. D. MALLON and CHELLIE MALLON,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

ROBERT V. BLADE,
1660 Lincoln Street, Oroville, California,
Attorney for Petitioners.

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Petitioners J. D. Mallon and Chellie Mallon hereby pray for Writ of Certiorari to issue to review the order of the United States Court of Appeals for the Ninth Circuit entered January 12, 1967.

ORDER BELOW

On January 12, 1967, the United States Court of Appeals for the Ninth Circuit entered its order, a copy

of which is attached hereto as Appendix "A". Said order, which is unreported, was that the appeal from the United States District Court for the Northern District of California, Northern Division, be dismissed as not timely filed.

FEDERAL JURISDICTION

Suit was originally brought by the United States to condemn certain property under the power of eminent domain and of the authority of the Act of Congress approved February 26, 1931 (46 Stat. 1421, 40 USC 258(a) and acts supplementary thereto and amendatory thereof). Jurisdiction of the District Court was invoked under 28 USC 1345. A notice of appeal from said final judgment was filed on May 17, 1965, the timeliness of which is the basis of the order above referred to and of this petition. Jurisdiction of the Court of Appeals for the Ninth Circuit was invoked upon 28 USC 1291. The jurisdiction of this honorable court is invoked under 28 USC 1254(1), (62 Stat. 928, June 25, 1948, Chapter 646).

STATEMENT OF THE CASE

This is a suit to condemn real property in connection with the Black Butte Dam and Reservoir Project in Tehama and Glenn Counties, California. It is one of a series of proceedings instituted by the United States to acquire land necessary for such project. The petitioners herein were the owners of

Tract 104 described in the complaint as comprising 1,139 acres. A jury trial was held commencing October 15, 1964, to determine just compensation. A verdict was rendered in the sum of $155,000.00 and judgment thereon was entered on October 31, 1964. A motion for new trial was submitted to the trial court on November 13, 1964, and denied by order of said court entered March 14, 1965. No notice of the filing of such order was given by the Clerk as required by Rule 77(d). However, a copy of the order was received by appellants' counsel on March 29th. On May 17, 1965, a notice was filed by the Clerk of said trial court for appeal to the Circuit Court of the Ninth Circuit from that portion of the judgment which determined just compensation to be the sum of $155,000.00.

On May 17, 1966, appellants filed and served their opening brief. Therein it was urged that the judgment should be reversed and that a new trial should be directed by reason of prejudicial errors, both of omission and commission, by the trial court in the conduct of the trial. Therein appellants stated that the notice of appeal filed on May 17, 1965, was "timely".

In September of 1966 the respondent served and filed its brief wherein it asserted that the appeal was not timely filed, that jurisdiction of the appellate court was lacking and urged that the appeal should therefore be dismissed. In addition, the respondent argued that a consideration of the appeal on its merits should result in affirmance of the judgment.

On November 23, 1966, a document entitled "Affidavit of Robert V. Blade Concerning Notice of Ap-

peal" was served and filed with the Clerk of the Court of Appeals for the Ninth Circuit, a copy of which is attached hereto as Appendix "B". Appellants thereafter filed and served their closing brief on December 3, 1966, and the matter came on for hearing before the Court of Appeals on January 5, 1967, at which time it was argued and submitted. Thereupon, the order subject hereof and set forth in Appendix "A" issued.

QUESTIONS PRESENTED

1. Whether the failure to file the notice of appeal within sixty days after the entry of the order of the trial court denying the appellants' motion for new trial as provided by Rule 73(a), Federal Rules of Civil Procedure, unequivocally deprived the Court of Appeals of jurisdiction. Relevant portions of Rule 73(a) are attached as Appendix "C".

2. Assuming, arguendo, that the filing of such notice more than sixty days after the entry of the order denying the motion for new trial but on the next court day following the sixtieth day, whether the appeal should be dismissed although the Clerk failed to give notice of the entry of such order as required by Rule 77(d). Rule 77(d) is set forth as Appendix "D".

3. Assuming, arguendo, that filing within sixty days after the order is not strictly jurisdictional and further, that failure of the Clerk to give notice thereof pursuant to Rule 77(d) is insufficient to require a hearing on the merits, would the fact that appellants'

counsel was of the belief (although possibly mistaken) that an order extending the time to file such notice had or would be procured from the trial court at a time when such court was authorized to issue such an order, alter the result, so that a hearing on the merits would be required?

REASONS FOR GRANTING THE WRIT

1. CLARIFICATION OF RULE 73(a) IS NECESSARY.

There are three decisions of this court which bear particularly upon the problem. They are:

Harris Lines v. Cherry Meat Packers (1962) 371 U.S. 215, 9 L. ed. 2d 261, 83 S. Ct. 283;

Thompson v. Immigration and Naturalization Service (1964) 375 U.S. 384, 11 L. ed. 2d 404, 84 S. Ct. 397;

Wolfsohn v. Hankin (1964) 376 U.S. 203, 11 L. ed. 2d 636, 84 S. Ct. 699, reh. den. 376 U.S. 973, 12 L. ed. 2d 87, 84 S. Ct. 1133.

In each decision this court set aside the order dismissing the appeal and required consideration thereof on the merits. Petitioners contend that the underlying principle in each of such cases applies herein and should produce the same result.

In *Harris Lines* the trial court purported to extend the time for a period of two weeks beyond the thirty day maximum provided by Rule 73(a).

In *Thompson* a motion for new trial was filed two days late. The extension of time within which to

appeal resulting from a timely motion was hence not available.

In *Wolfsohn* the trial court issued an order purporting to extend the time to appeal although clearly without authority to do so.

Here, had petitioners' counsel been aware that no order extending time had been issued, or that the notice was filed one day late, it is reasonable to conclude that an order extending such time would have been granted. The mistaken belief of counsel herein would seem to be closely parallel to the mistaken belief of counsel in each of the cited cases. Here, through inadvertence, no order was applied for, although clearly available. In *Harris* and *Wolfsohn* orders were issued and treated as valid although beyond the authority conferred by the rule and, in *Thompson,* an *untimely* motion was deemed to be *timely* for the purpose of extending time to appeal within the rule. Equal application of all provisions of the rule would deem this appeal to be timely.

2. FAILURE OF THE CLERK TO GIVE NOTICE PURSUANT TO RULE 77(d) SHOULD BE CLARIFIED.

In *Hill v. Hawes,* 320 US 520, 88 L. ed. 283 (1944), the failure of the Clerk to give notice as required by this rule resulted in extending the time. Thereafter, the final sentence of Rule 77(d) was added in 1946. The adoption of such final sentence did not prevent the court from following the principle of *Hill* and thereby treating the time as extended in:

Lohman v. United States (6 Cir. 1956) 237 F. 2d 645.

See also

Blunt v. United States (DCCA) 244 F.2d 355.

Thus, a conflict exists between *Lohman* and a literal application of the last sentence of Rule 77(d), as in this case, which should be resolved.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated, Oroville, California,
April 3, 1967.

Respectfully submitted,
ROBERT V. BLADE,
Attorney for Petitioners.

(Exhibits Follow)

Exhibit "A"

United States Court of Appeals
For the Ninth Circuit

No. 20,444

J. D. Mallon, et al.,
Appellants,

vs.

United States of America,
Appellee.

ORDER

Appeal from the United States District Court
for the Northern District of California
Northern Division

Before: Madden, Judge of the Court of Claims,
and Jertberg and Browning, Circuit Judges

The appeal must be, and is, dismissed as not timely filed. However, we wish to state that we are satisfied from an examination of the briefs and record that no reversible error occurred.

J. Warren Madden
Judge of the Court of Claims
Gilbert H. Jertberg
James R. Browning
United States Circuit Judges

Filed January 12, 1967,
Wm. B. Luck, Clerk.

Exhibit "B"

In the United States Court of Appeals
For the Ninth Circuit

No. 20,444

J. D. Mallon, et al.,
Appellants,

vs.

United States of America,
Appellee.

AFFIDAVIT OF ROBERT V. BLADE CONCERNING NOTICE OF APPEAL

State of California
County of Butte—ss.

Robert V. Blade being first duly sworn, deposes and says:

Affiant personally prepared Appellants' Opening Brief and is responsible for the statement on page 2 to the effect that the Notice of Appeal filed on May 17, 1965, was timely. Upon receipt of appellee's brief in September, 1966, affiant was surprised at the first point raised, i.e., that the Notice was not timely filed. Several computations compelled the conclusion that the sixtieth and final day for filing the Notice computed from March 15th when Judge Clark's Order denying appellants' motion for new trial was entered

fell on Friday, May 14th. The statement above referred to is thus in error unless time is computed from receipt of a copy of the Order as below described.

Affiant then set about to determine what did occur at the time of such filing. At the outset it must be said that affiant has been practicing law in the State of California for more than twenty years and is thoroughly familiar with appellate procedures in the State courts. This is his first federal court appeal, which has created a few problems. However, the rule requiring that a Notice of Appeal be filed with the clerk on or before expiration of the time allotted therefor is familiar to him because the state practice is the same as the federal in this respect.

Affiant personally examined the docket entries in the Clerk's office. They reflect that Judge Clark's Memorandum and Order denying defendant's Motion for New Trial and for Amendment of the Judgment was received and filed on March 15, 1965. They fail to show that the Clerk gave notice of the entry thereof to counsel as required by Rule 77(d).

Affiant's own records contain no notice of the entry of Judge Clark's Order consistent with Rule 77(d). However, on March 29, 1965, a copy of Judge Clark's Memorandum and Order was received in the United States mail in affiant's office, upon which copy there was stamped a notation to the effect that the original was filed March 15, 1965, Clerk, U. S. District Court. Presumably such copy was mailed by the Clerk on March 28th.

No notice of the entry of such order was received from opposing counsel as authorized by said Rule 77(d). Affiant received no informal or other communication concerning Judge Clark's ruling until said copy was received in his office as above stated. Affiant had no knowledge of any kind concerning the making of or the entry of such order until such receipt.

Promptly thereupon affiant computed the time within which an appeal could be filed, concluding that the sixtieth and last day would be May 14, 1965. Within affiant's office there is a calendar of important dates mentioned under the supervision of the several attorneys. Affiant caused an entry to be made in such calendar showing that the last day to file the notice of appeal in this case was on May 14.

Subsequent to receipt of a copy of Judge Clark's order affiant was in communication with his associate counsel Mr. Jerome D. Peters of Chico and with the appellants concerning whether an appeal should be taken from the Judgment and incidental problems including probabilities, expenses and similar matters. Affiant's records disclose that on the 31st day of March, 1965, affiant wrote to the appellants advising them of Judge Clark's ruling and that the last day to file the notice of appeal would be May 14, indicating the necessity of a reasonably prompt decision by them as to whether they wished to appeal or not.

During the second week of May appellants requested that the appeal be taken. The Clerk's records herein disclose that the notice of appeal was mailed

from affiant's office on May 14, 1965, a Friday, and received in the Clerk's office on May 17, and on that day filed. The question of whether the Notice of Appeal was timely filed was not raised by anyone until appellee's brief was received in September of 1966, approximately one and one-half years after the events in question. As a result it has been extremely difficult to reconstruct the facts.

To the best of affiant's recollection, he held a conversation with one of the clerks in the District Court in Sacramento before the expiration of the sixty days at which time he was assured that an extension for thirty days would be obtained from the trial court pursuant to Rule 73(a)(2). However, affiant cannot at this time state the name of the individual with whom he thinks such conversation concerning the extension of time was held. Inquiry among such clerks has been made and none recalls any such conversation.

Affiant has since examined the eight folders which constitute the District Court's file herein and has been unable to locate any Order extending the time to file the Notice of Appeal. Except for a complete mental aberration, the possibility of which cannot at this time be positively excluded, affiant would never have mailed the notice of appeal on May 14 but would have instead driven to the Clerk's office and there filed it personally since that office is only a little over one hour's drive from affiant's office. Therefore, in view of affiant's knowledge of the necessity that the notice be *on file* and his belief that an extension of

time had been or would be obtained, affiant believes that he mailed the notice in reliance thereon.

Affiant distinctly recalls and his records disclose that on Monday, May 17th, he received a telephone call from Mr. William Robb who is the chief clerk in the Sacramento office of the district court in which conversation Mr. Robb advised that affiant had failed to enclose a check for $5.00 which the rules require and asked if affiant would immediately send the same, stating that he would file the notice immediately upon affiant's assurance thereof. Affiant can recall Mr. Robb's saying that the failure to include the check would not prevent the filing of the document and that affiant thereupon believed that the notice of appeal had been timely filed. Affiant did transmit the check and a copy of the letter in his office shows that this was sent on Tuesday, May 18th. At that time, affiant and Mr. Robb were presumably aware of the rule which permits the district court to extend the time for thirty days even after the sixty days has elapsed. (Rule 73(a)(2).) Mr. Robb has no recollection of the circumstances but affiant is certain that had Mr. Robb been aware of the fact that the notice had been received one day late he would have so advised affiant and affiant would have obtained or at least sought the necessary order therefor.

Affiant might be asked whether or not the order which he was informed would be obtained was not in fact the order extending the time to docket the appeal which Judge Halbert did sign on the 13th day of June, 1965. Affiant would necessarily have to reply

in the affirmative. It is possible that this is what he recalls but he thinks otherwise.

Affiant and his office have long enjoyed excellent relations of all of the members of the Clerk's office in Sacramento and is aware of the usual practice of such clerks routinely to advise the attorneys and to obtain extensions of time so as to give to each attorney desiring to appeal the maximum protection possible. Affiant is therefore of the opinion that it is possible, perhaps probable, that such an order was obtained but mislaid or not filed. In any event, affiant did not recompute the time nor at any time thereafter consider the possibility that the notice of appeal was not timely until his attention was drawn to it by respondent's brief.

Robert V. Blade

Subscribed and sworn to before me
this 21st day of November, 1966
(Seal) Madeline C. Wigely

Madeline C. Wigely
Notary Public, In and for the
County of Butte, State of California

Madeline C. Wigely
My Commission Expires June 11, 1968

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that a copy of the foregoing Affidavit of Robert V. Blade Concerning Notice of Appeal was this day mailed to:

Edwin L. Weisl, Jr., Assistant Attorney General
Roger P. Marquis, Attorney, Appellate Section
Raymond N. Zagone, Attorney Land and Natural Resources Division
United States Department of Justice
Washington, D. C.
Attorneys for United State of America
Dated: November 21, 1966.

Robert V. Blade

Exhibit "C"

"RULE 73. APPEAL TO A COURT OF APPEALS.

(a) How and When Taken. An appeal permitted by law from a district court to a court of appeals shall be taken by filing a notice of appeal with the district court within 30 days from the entry of the judgment appealed from, except that: (1) in any action in which the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days from such entry; (2) upon a showing of excusable neglect the district court in any action may extend the time for filing the notice of appeal not exceeding 30 days from the expiration of the original time herein prescribed; . . . The running of the time for appeal is terminated as to all parties by a timely motion made by any party pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: granting or denying a motion for judgment under Rule 50(b); or granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; or granting or denying a motion under Rule 59 to alter or amend the judgment; or denying a motion for a new trial under Rule 59.

Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal . . ."

Exhibit "D"

RULE 77.

"(a) Notice of Orders and Judgments. Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear, and shall make a note in the docket of the mailing. Such mailing is sufficient notice for all purposes for which notice of the entry of an order is required by these rules; but any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 73(a).

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1226

J. D. MALLON AND CHELLIE MALLON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In March 1960, the United States condemned specified interests in approximately 3,595 acres, which included the fee title to 1,139 acres owned by petitioners, for use in the Black Butte Dam and Reservoir Project, in Tehama and Glenn Counties, California. Jury trial to determine just compensation in October 1964 resulted in a verdict of $155,000. Judgment was entered thereon on October 31, 1964, and petitioners' timely motions for new trial, to vacate the verdict and to amend the judgment were denied on March 15, 1965.

Petitioners received notice of the order denying their motions from the district court clerk on March 29, 1965, and thereupon computed the time limits for

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appeal (Pet. 3; Pet. App. iii–iv). On the last day for timely filing (Friday, May 14, 1965), petitioners, through their counsel—who knew that it must be actually filed on that day (see Pet. App. v)—mailed a notice of appeal which, in due course, was received and filed by the district court clerk on Monday, May 17, 1965.

After briefing and argument by the parties on the merits, the court of appeals dismissed the appeal as not timely filed, adding (Pet. App. i): "However, we wish to state that we are satisfied from an examination of the briefs and record that no reversible error occurred."

There is no warrant for review by this Court of the determination that the notice of appeal was not timely filed. Unlike the situation in *Wolfsohn* v. *Hankin,* 376 U.S. 203, *Thompson* v. *I.N.S.,* 375 U.S. 384, and *Harris Lines* v. *Cherry Meat Packers,* 371 U.S. 215, there was here no reliance on action by the trial court or by an adversary at a time when a timely notice of appeal could have been filed.[1] Moreover,

[1] Petitioners' reliance on Rule 73(a)(2) is misplaced, since no action was taken under that Rule within the 30-day period. Moreover, it should be noted that the present provision of the Rule, *viz.*, "upon a showing of excusable neglect the district court in any action may extend the time for filing the notice of appeal not exceeding 30 days from the expiration of the original time herein prescribed," did not become effective until July 1966. That part of the Rule in effect in May 1965 provided "except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed." Petitioners admit they learned of the judgment in March 1965.

here—as was not true in cited cases—the court of appeals, in addition to deciding that the notice of appeal was not timely filed, accorded petitioners a full briefing and hearing on the merits and concluded, after "examination of the briefs and record that no reversible error occurred."

Since petitioners received notice of the denial order on March 29, 1965 (14 days after its entry), there is no basis for their claim that the district court clerk failed to give notice and that Rule 77(d) and *Hill* v. *Hawes,* 320 U.S. 520, are somehow involved. In any event, "Rule 77(d) has been amended to avoid such situations as the one arising in *Hill* v. *Hawes* * * *." Notes of Advisory Committee on 1946 Amendments to Rules.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

MAY 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967